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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEVON MOURADIAN,

Defendant and Appellant.

B171509

(Los Angeles County
Super. Ct. No. GA051093)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Lillian M. Stevens, Judge. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez,
Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General,
for Plaintiff and Respondent.

Levon Mouradian appeals from the judgment entered following his convictions by jury of two counts of insurance fraud (Pen. Code, § 550, subd. (a)(1), count one; Pen. Code, § 550, subd. (a)(5), count two), perjury under oath (Pen. Code, § 118, count three), and making a false report of a criminal offense (Pen. Code, § 148.5, subd. (a); count four). He was sentenced to prison for three years.

In this case, we conclude the trial court did not prejudicially err by excluding certain testimony and documentary evidence, and appellant was not denied effective assistance of counsel by any failure of his trial counsel to timely disclose discovery.

FACTUAL SUMMARY

1. People's Evidence.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that appellant bought a car which, as a result of a previous accident, was a total loss. However, after buying the car, appellant insured it. Later, in March 2001, appellant falsely reported to police that the car had been stolen (count four) and, to fraudulently collect on the insurance policy, submitted to his insurance company a false insurance claim (count one), false affidavit (count two), and perjured statement under oath (count three).

Specifically, Sherry Armstrong, a claims specialist for 21st Century Insurance (Century), determined that in February 2000, a BMW with a specified vehicle identification number (VIN) was involved in an accident. In April 2000, the car's insurer at the time, Progressive Insurance (Progressive), reported the car an unrepairable total loss. Progressive determined the value of the car was \$44,000 and the repair cost would exceed that amount. Progressive paid off the driver of the car and gave it to Co-Part Salvage. Lynwood Auto Dismantlers (Lynwood) in Lynwood, California, later bought the car from Co-Part Salvage for \$5,500.

Hamlet Tavanian owned Lynwood on April 28, 2000. He testified that a bill of sale indicated that, on that date, Lynwood sold a 1999 BMW to appellant for \$6,400. The

VIN number of the car was the same as the VIN number of the car involved in the February 2000 accident.¹

Armstrong testified that appellant had insured a BMW with Century. The insured BMW had the same VIN number as the VIN number of the car involved in the February 2000 accident. Century did not require that cars be visually inspected before they were insured.

On March 3, 2001, Burbank Police Officer Bruce Slor went to 50 East Palm in Burbank. Once Slor arrived, appellant and his wife reported to Slor that appellant had parked his 1999 BMW across the street from a theater, appellant and wife had entered the theater, but, when they returned, the car was gone. (Count four.) Slor obtained the car's VIN number. Slor found no broken glass or signs of forced entry at the location where appellant said the car had been parked. The VIN number Slor obtained was the same as the VIN number of the BMW involved in the February 2000 accident.

Later in March 2001, appellant submitted a claim to Century that stated that his BMW had been stolen on March 3, 2001. (Count one.) Still later that month, appellant filed with Century an "affidavit of total auto theft[.]" (Count two.) The affidavit indicated that appellant bought the car from Andy's Imports for \$37,000, appellant was employed as a messenger, and there was no lienholder on the car. The VIN numbers of the allegedly stolen BMW, the BMW insured by Century, and the BMW involved in the

¹ At trial, Tavanian was shown a document purporting to be a bill of sale dated August 15, 2000, and containing his signature and seller's identification number. The document reflected a purchase price of \$32,000, which was incorrect. Tavanian denied having signed the document and denied he had ever seen it before an investigator showed it to him. A California Department of Motor Vehicles (DMV) ownership/registration form reflected appellant was the registered owner of a BMW with a specified VIN number. The form incorrectly reflected that the vehicle pertained to a "nonresident from another state" and erroneously failed to reflect that the vehicle was a salvaged vehicle. A DMV verification of vehicle form reflected appellant's name and driver's license number, but the form was not properly completed. The form did not specify whether the vehicle had license plates, and did not include the requisite title, badge, or identification number of a DMV employee. The form had been stamped with an outdated DMV stamp. The form reflected the forged signature of a Lynwood, California DMV employee.

February 2000 accident were the same. Armstrong noted the insurance policy was new, that is, issued in September 2000.

Appellant submitted Wells Fargo bank statements showing a total of \$37,710 in withdrawals from June 14 to September 14, 2000. Armstrong testified appellant gave a statement (apparently written) “where he indicated that he paid for the vehicle in cash, part by withdrawing money from Wells Fargo and partly by a money order[.]” Armstrong also testified “there was not [a] single withdrawal that would coincide with the purchase of the vehicle at the amount that he indicated he bought it.”

On March 31, 2001, Henry Petroski, a Century investigator, conducted a sworn and transcribed interview of appellant. Appellant again claimed that his car had been stolen. (Count three.) Appellant also claimed his car had been in perfect mechanical and body condition. Appellant further claimed he bought the car from Andy’s Imports. Petroski testified that appellant “[s]aid he had saved the money and he deposited it in Wells Fargo bank and he took the monies out of Wells Fargo bank[.]” Appellant produced a copy of a purchase order for a 1999 BMW with its VIN number, as well as the address of Andy’s Imports. Appellant claimed he had the BMW serviced at a Jiffy Lube on Victory and Olive, but he did not have a receipt.

Petroski went to the address of Andy’s Imports reflected in the purchase order. Petroski testified that, upon arrival, he found “a house with wrought iron around it and razor wire on the top, and [a] bunch of junk cars on the lawn, and the sign said [T.O.] Imports.” Petroski spoke to a person named Gero who gave Petroski a purchase order dated September 6, 2000, and reflecting that appellant paid \$36,598 for a 1999 BMW.

Petroski asked Gero if Petroski could speak to someone from Andy Imports. Gero replied that he did not know what Petroski was talking about, and Petroski asked if Gero knew Andy. Gero replied in the negative. Petroski told Gero, “Well, somebody bought a car here and says he bought it from Andy from Andy’s Imports.” Gero replied, “Oh, Andy[.]” and said Andy came once and a while and sold cars. Gero did not know Andy’s last name, phone number, or address. Petroski could not find a company named Andy Imports or anyone from that company. Century denied appellant’s claim.

2. Defense Evidence.

In defense, appellant claimed that someone did a “VIN switch” and put the VIN number of the unrepairable BMW on a new 1999 BMW. Appellant, unaware of the switch, bought the latter car, and it was that car that was stolen outside the theater.

Specifically, California Department of Insurance Criminal Investigator Stuart Thompson testified that he determined the 1999 BMW was not drivable as of April 28, August 15, or September 6, 2000. The car could have been registered as drivable as a result of DMV clerical error, or as a result of fraud by DMV personnel and those who possessed the car. A VIN switch could have occurred, in which the VIN number of a BMW which was not drivable was transferred to a similar looking but stolen BMW.

However, Tavanian told Thompson that on April 28, 2000, the person who bought the vehicle paid for it by a check in the amount of \$6,400. Thompson looked at Wells Fargo bank accounts of appellant and his wife. The balances indicated there may have been \$37,000 available from June through September 2000, but Thompson saw no evidence of checks of specified amounts made payable to DMV or for license fees. Thompson found no used car business licenses for Andy’s Imports or Gero’s Auto Sales.

Pogos Ekmekchyan, who was convicted in 1996 of felony shooting at an uninhabited dwelling, testified he was sometimes called Gero, which meant Jerry in Armenian. In 2000 or earlier, Ekmekchyan had a used car business named Gero’s Auto Sales. Ekmekchyan did not register with DMV as a used car salesman. Ekmekchyan had known appellant for about six years. About two or three times, someone whom Ekmekchyan knew only as Andy sold cars from Ekmekchyan’s used car business. Andy used the name Andy’s Imports.

In early 2000, appellant told Ekmekchyan that appellant was looking for a 1999 BMW. Ekmekchyan introduced appellant to Andy. Andy later drove a 1999 BMW to Ekmekchyan’s lot. Ekmekchyan was present when Andy delivered the car to appellant. Ekmekchyan talked with Andy to try to collect a commission, but never spoke to Andy again. Ekmekchyan closed his used car business after five to six months. Later, an

investigator asked Ekmekchyan about the sale of the car to appellant. Ekmekchyan gave the investigator a purchase order.

Davis Tarverdi, appellant's cousin, testified that in 2000, appellant was trying to buy a 1999 BMW. Tarverdi went with appellant to pick up the car at a North Hollywood lot. Appellant paid all cash for the car. Tarverdi later saw the car several times. The car had a manual transmission and there was nothing wrong with the car.

Jrayr Khachatourian, appellant's brother-in-law, was a mechanic who owned J's Auto Clinic. In 2000, Khachatourian examined a 1999 BMW that appellant had been thinking of buying. The car had an automatic transmission and no signs that it had been in an accident. Khachatourian did a lube job on the car after appellant bought it, and Khachatourian saw the car in appellant's driveway a number of times. Prior to September 2000, Khachatourian paid appellant \$20,000 which appellant had loaned him.

Marco Muniz, appellant's co-worker at a messenger service, saw appellant's BMW a number of times in 2000. In November 2000, Vigen Tarvirdi, appellant's cousin, went to a family gathering where a photograph was taken depicting Tarvirdi leaning against appellant's car.

Anita Mouradian (Anita), appellant's wife, testified appellant bought a BMW in September 2000. Appellant paid almost exactly \$36,000 in cash. The money came from Anita's Wells Fargo bank account. The price included registration and taxes, but the dealer was to pay these. Anita previously had paid cash for a car; in 1994 or 1996 she had paid cash for a Land Rover. Anita corroborated appellant's account of the alleged March 3, 2001 theft of the BMW from in front of the theater.

Armen Avani, who had a 1998 or 1999 conviction for tampering with a smog check computer, was an auto repair mechanic. Avani had a brake and lamp repair order for a 1999 BMW which was signed by whoever brought the car to Avani. The signature was purportedly appellant's. Avani did not recall seeing either appellant on the date the work order was made, or who brought the car to Avani. Avani issued a brake adjustment certificate.

3. Rebuttal Evidence.

In rebuttal, Felipe Martinez testified that he had worked for Jiffy Lube for 11 years and had worked at the Jiffy Lube at Victory and Olive in Burbank for 3 years. He was familiar with its computer database system, which contained the names of Jiffy Lube customers and information about their cars. Neither appellant's name, nor information about his BMW, were in the database.

On July 24, 2002, Thompson was interviewing appellant at appellant's home when appellant told Thompson that appellant bought the 1999 BMW from Andy's Imports at A to Z Auto located in North Hollywood. Appellant did not mention Gero's Auto. Appellant said the BMW was almost new and had no visible damage. Appellant also said the salesman's name was Andy, and that appellant did not know Andy's last name.

Thompson showed appellant a DMV vehicle vessel transfer form which reflected that the BMW was transferred from Tavanian to appellant on April 28, 2000. Appellant denied knowledge of the document.

Thompson showed appellant an application for title or registration dated August 15, 2000. The application reflected a car sales price of \$32,000. Appellant acknowledged that the date and purchase price were correct. Appellant acknowledged his signature on a sales contract dated September 6, 2000. Thompson asked appellant how appellant registered a vehicle on August 15, 2000, when appellant did not buy it until September 6, 2000. Appellant did not respond.

Thompson asked whether appellant had any professional experience in selling and buying cars. Appellant replied in the negative. Thompson showed appellant a DMV occupational license dated October 29, 1993, and reflecting that appellant was an automobile salesman. Appellant replied, "'So?'" Thompson said it appeared that appellant was experienced in understanding and obtaining DMV documents. Thompson testified that appellant indicated that Andy possibly had bought the BMW from Lynwood, repaired it, then sold it to appellant.

Thompson testified he then posed a series of questions to appellant. The following then occurred during the People's direct examination of Thompson: "Q What did you

pose to him? [¶] . . . [¶] The Witness: The first question that I posed to [appellant] was if in fact he did believe that Andy had some way somehow repaired this vehicle and offered it to sell to [appellant], how was it or why would Andy put his information in the bill of sale between the transaction with Lynwood Dismantling. [¶] In addition, I asked how would Andy know how to sign [appellant's] name. [¶] And third, I told [appellant] that even if those situations took place, that still wouldn't actively respond to how [appellant] happened to register a vehicle that [appellant] had yet to purchase. [¶] Q Did [appellant] have a response [for] you? [¶] A No."

Appellant told Thompson that appellant had the BMW serviced at Jiffy Lube at Olive and Victory in Burbank. Thompson asked appellant why Jiffy Lube had no record of that car. Appellant did not respond. Anita told Thompson to leave the Mouradians' home.

DMV documents dated 1993 and 1994, reflected that appellant applied to be a car salesperson and listed his prior experience as an auto mechanic employed by J's Auto Service. DMV documents did not reflect that Ekmekchyan had a dealer's or salesperson's license, or that any license was issued to Gero's Auto Sales.

4. Surrebuttal Evidence.

On September 17, 2000, a certificate of title to the BMW was issued to appellant. Thompson did not look at that document with appellant. A handwriting expert compared appellant's handwriting with three DMV documents, that is, a vehicle transfer form dated April 28, 2000, an application for title or registration dated August 15, 2000, and a transfer and reassessment form dated August 15, 2000. The expert's testimony provided evidence that appellant did not fill out or sign the forms.

CONTENTIONS

Appellant contends: (1) "The preclusion sanction was not supported by a showing of willful discovery abuse calculated to obtain a tactical advantage, therefore the court abused its discretion by excluding various witnesses and from introducing documentary evidence to the jury, thereby depriving appellant of his federal and state constitutional rights to present a defense, to due process, and to a fair trial" and (2) "Trial counsel's

failure to disclose discovery in a timely manner constituted prejudicial ineffective assistance of counsel.”

DISCUSSION

The Court Did Not Reversibly Err by Excluding Evidence As a Discovery Sanction, and Appellant Was Not Denied Effective Assistance of Counsel.

1. Pertinent Facts.

From September 4 through October 21, 2003, inclusive, the case was repeatedly called for jury trial and appellant, represented by Theodore Flier, presented untimely and/or incomplete discovery.² On October 24, 2003, during the People’s case-in-chief, appellant cross-examined Barbara Rogers, an administrative manager for the Inglewood DMV office. Appellant showed Rogers a document and asked if Rogers was familiar with a “demand for payment document where the DMV says the money wasn’t, in fact, paid[.]” Rogers indicated that DMV did not generate such documents. The prosecutor

² On September 4, 2003, “two of ten[.]” the prosecutor indicated that, on that day, he had received an untimely defense witness list which did not include the witnesses’ addresses or birth dates. Appellant’s counsel replied that he had just realized that a possible prosecution theory was that the BMW did not exist, therefore, appellant’s counsel added witnesses who would testify that they had seen the car. The trial court ordered appellant to comply with discovery by September 8, 2003.

On September 23, 2003, zero of 30, the prosecutor indicated that he had received an incomplete amended defense witness list. He had sent a letter to appellant’s counsel on September 11, 2003, requesting the rest of the information, but the prosecutor represented that he had not received the additional information. Appellant’s counsel told the court that he did not have complete information regarding witnesses. The trial court indicated, inter alia, that the prosecutor could move for sanctions if additional information regarding defense witnesses was untimely provided.

On October 21, 2003, 28 of 30, the prosecutor requested sanctions due to appellant’s failure to timely provide discovery. Specifically, appellant sought to introduce a photograph of appellant’s cousin touching a vehicle, and appellant’s cousin’s testimony that the photograph was authentic. Appellant’s counsel indicated he had obtained the information on October 16, 2003. Appellant’s counsel gave the witness’s name to the prosecutor. However, appellant’s counsel stated that he “just reread [Penal Code section] 1054” and might have to produce the photograph. The trial court found appellant’s counsel’s explanation unreasonable, concluded appellant should have discovered the information earlier, and ruled that the prosecution was entitled to a jury instruction regarding untimely discovery.

indicated the document had not been marked for identification and requested a sidebar discussion.

At sidebar, the prosecutor complained that he had never seen the document, and asked the court to inquire why the document had not been given to the prosecutor before it was shown to Rogers. Appellant's counsel replied that he "just got this." The court indicated that that was not an excuse if appellant could have obtained the document earlier. Appellant's counsel suggested he had not known of the document's existence. Appellant's counsel stated, without citation to authority, "This is impeachment documentation. I don't have to give this even then." (*Sic.*) Appellant's counsel indicated that he was going to show that "the check was not paid by [appellant]. . . . Somebody else paid those fees and that party even bounced the check." The prosecutor suggested it was improper to show the document to Rogers before it had been shown to the prosecutor. The court ruled the document would not be shown to Rogers "at this time."

From later on October 24, 2003, through October 28, 2003, during the defense presentation of evidence, appellant provided incomplete and inaccurate discovery. For the October 28, 2003 discovery violation, the court, on that date, imposed a \$1,000 sanction on appellant's counsel.³

³ On October 24, 2003, during appellant's case-in-chief, appellant called Pogos Ekmekchyan to testify. At sidebar, the prosecutor indicated that Jerry, but not Pogos, Ekmekchyan was on appellant's witness list. Appellant's counsel explained that he was given the name Jerry. The court permitted direct examination of Ekmekchyan but continued to another time the cross-examination of Ekmekchyan to permit the prosecutor to investigate him.

On October 27, 2003, the prosecutor indicated that appellant misspelled Ekmekchyan's name on appellant's witness list with the result that the People needed a continuance to investigate Ekmekchyan's criminal history. The court granted the request. The court also verified the spelling of the names on appellant's second amended witness list. The court told appellant's counsel that he was responsible for correct spellings. On October 28, 2003, the prosecutor indicated that he had received a new defense witness list that had a new spelling of a defense witness's name. The court imposed the above mentioned \$1,000 sanction on appellant's counsel, but later reduced it.

On October 30, 2003, during appellant's direct examination of Anita, appellant proffered a document to corroborate her testimony that, on a previous occasion, she had purchased another car for cash. At sidebar, appellant's counsel explained he did not know about the document until "late last night" and did not believe he had to provide it to the prosecution because the document was corroborative. The court indicated that a jury instruction regarding untimely discovery would probably be appropriate. The prosecutor replied that the People already had rested, there was no time for the prosecutor to investigate the document, and the issue was arising late in the defense presentation of evidence. The court ruled that appellant could not use the document. The court stated, "[i]t is terribly late and it is disadvantageous to the other side and it does not comply with the requirements of the Code."

During later redirect examination, Anita testified she had received in the mail a document from DMV regarding a dishonored check. Outside the presence of the jury, appellant identified the document as the previously mentioned DMV demand for payment document which the court had ruled would not then be shown to Rogers. The prosecutor objected to the document as hearsay. Appellant's counsel urged the document was a "precursor for other documentation from the DMV. This is a vital piece of evidence which . . . will show . . . that the money that was paid for the registration and the license was paid by Yervant Sarian. We will have other information to show Yervant Serian [*sic*] was Andy's Imports and we have other information to show that that was finally repaid by him." (*Sic*.)

Appellant urged the document was admissible under the "subsequent conduct" exception to the hearsay rule. The court indicated it knew of no such exception, invited appellant to show such an exception existed in the Evidence Code, but appellant did not accept the invitation. The court excluded the document as hearsay.⁴

⁴ The trial court asked appellant's counsel whether he had provided discovery regarding other DMV documents. Appellant's counsel replied that he had not, and that he had just received them. The prosecutor moved for sanctions, but the court did not then rule on that issue.

Later, appellant called Faye Hearn, a DMV registration clerk, to testify concerning certain DMV documents. Hearn was the fourth of five witnesses called by appellant during his defense. Appellant's counsel identified the documents as defense exhibit numbers one through six. The court granted the prosecutor's request for a sidebar discussion.

At sidebar, the prosecutor indicated he had never seen the documents before and wanted a chance to examine them. The court asked appellant's counsel why he did not show them to the prosecutor. Appellant's counsel replied, "I just got them." The court then stated, "Why don't you show the evidence to opposing counsel before you inquire. You know you have to do that."

The court looked at the documents and asked who Yervant Sarian was. Appellant replied that Sarian was Andy of Andy's Imports. The court asked, "How do we know that?" Appellant replied that he would prove it.

The prosecutor indicated that the documents had not been provided to the People and the prosecutor requested that the court exclude them. Appellant's counsel replied that he had tried to subpoena the documents for "probably" six weeks, he had been in constant communication with DMV, and subpoenas had been issued. Appellant's counsel also stated, "We have been promised the documents would arrive. We got 'em faxed in late last night. We still got the person here who is supposed to testify to 'em. She just arrived. I didn't know she was going to be here on time for this morning's session and that's why we have not turned them over." Appellant's counsel also said he received the documents "probably late last night."

The court told appellant, "You are required to give discovery, if it's late, as soon as possible." The prosecutor indicated appellant had not told the prosecutor about the documents that morning. The court asked why not, and appellant's counsel stated, "Because I didn't know we were going to get the person here to lay the foundation for them to come into evidence. In fact if I hadn't stopped her by the elevator she would have been gone."

The court stated, “if I accept your answer that you have been trying for 6 weeks and I don’t know why you could not have obtained them during that 6 weeks, but if I accept that, nevertheless, you should have informed counsel first thing this morning and that’s the law. And I am really at a loss to understand why you continually present documents without even showing them to opposing counsel in the courtroom. When you have the duty of reciprocal discovery.” (*Sic.*) The court asked the prosecutor what relief he requested, and the prosecutor replied that he wanted the evidence excluded, and that exclusion was appropriate “given where we are at in trial.”

The court stated, “[i]f this were the first time it would be different but it’s time after time after time and the sanction is that these documents may not be used in this trial.” Appellant’s counsel moved for a mistrial “on the basis that my defendant’s constitutional rights have been abridged. A vital part of his defense has been taken away by this sanction. It’s draconian in nature and I will submit it.” The court replied, “[Y]our statement is in the record. And the court stands by its ruling.” Appellant’s counsel stated, “We are not going to have to use [Hearn].” The court excused her as a witness.

Appellant’s counsel later explained that the reason he did not “give the documents that I had that morning over to the prosecutor is they were not certified copies” Appellant’s counsel said he “subpoenaed . . . I think three or four times” and had been assured that a DMV representative would come with certified copies. Appellant’s counsel stated, “And we didn’t have them. So what I had were copies but they were not certified copies. [¶] There was no foundation that was going to be able to be laid that these were in fact the correct documents. . . . that’s why they weren’t turned over to the prosecutor.”

The court later stated, “I don’t think that’s a very good explanation. . . . Whatever you had that you thought you could correct during the morning should have been turned over to the People. That’s the law. And your excuse is really a very weak excuse” The court also told appellant’s counsel, “you didn’t even show them to the district attorney before you started asking questions.”

On November 3, 2003, appellant's counsel requested permission to reopen to present certified copies of the DMV documents referred to in the immediately preceding paragraph. Appellant's counsel explained that he had received the documents, he guessed, on the preceding Saturday, and "[t]hese documents, . . . show who in fact paid the tax and the license. In fact, the check was dishonored and finally it was made good and the dealership that employed Yervant Sarian." (*Sic.*) The prosecutor objected, and the court observed, "This doesn't give the People any time at all to respond." The court stated, "these documents are extremely tardy. Along with so much of the evidence which you have produced. . . . You have produced it unfairly and not according to law. You are to give notice to the other side. There is reciprocal discovery and you have consistently given late notice or no notice and again today you produce them for the court at the same time you produce them for opposing counsel. . . . They will not be admitted."

2. *Analysis.*

We review appellant's contentions under familiar principles enunciated in the relevant discovery statutes.⁵ Moreover, since appellant's contentions implicate

⁵ Penal Code section 1054.3, states, in relevant part, "The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (a) The *names and addresses* of persons, other than the defendant, he or she intends to call as witnesses at trial, . . . [¶] (b) *Any real evidence* which the defendant intends to offer in evidence at the trial." (Italics added.)

Penal Code section 1054.5, subdivision (b), states, in relevant part, "Upon a showing that a party has not complied with [Penal Code] Section . . . 1054.3 . . . , a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, *immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter*, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (Italics added.) [Penal Code section 1054.5,] subdivision (c), states, in relevant part, "The court may *prohibit the testimony of a witness pursuant to [Penal Code section 1054.5,] subdivision (b) only if all other sanctions have been exhausted.*" (Italics added.) "The statutory duty to exhaust all other sanctions requires a trial court to *consider* these endorsed sanctions before imposing a preclusion sanction." (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1264-1265, italics added.)

constitutional rights, we note that “Under federal law, the factors to be considered in determining the appropriate remedy for discovery violations include: (1) the effectiveness of less severe sanctions, (2) the impact of preclusion on the evidence at trial and the outcome of the case, (3) the extent of prosecutorial surprise or prejudice, and (4) whether the violation was willful. (*Taylor v. Illinois* [(1988) 484 U.S. 400,] 415, fn. 19 [98 L.Ed.2d 798])” (*People v. Edwards, supra*, 17 Cal.App.4th at p. 1264.)

Finally, “*preclusion* sanctions may be imposed against a criminal defendant only for the most egregious discovery abuse. Specifically, such sanctions should be reserved to those cases in which the record demonstrates a *willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial*” (*People v. Edwards, supra*, 17 Cal.App.4th at p. 1263, italics added.)

Appellant claims in his opening brief that “The trial court erred in excluding the testimony of various witnesses, particularly DMV employee Faye Hearn, and various exhibits including the exhibits marked as Defense D1-6 [hereafter, defense exhibits].” He also claims in his opening brief that there was other important but excluded evidence, and offers as an “example” the document appellant proffered to corroborate Anita’s testimony that she previously had paid cash for a car. Appellant does not, in his opening brief, specifically refer to any other evidence as having been erroneously excluded.

As to the Hearn testimony and defense exhibits, appellant’s counsel, in a familiar refrain, claimed to have just obtained them. However, the court told appellant’s counsel that appellant’s counsel knew that he had to show the documents to the prosecutor before appellant’s counsel used them during the examination of Hearn. Appellant’s counsel did not deny that he knew. The court later told appellant’s counsel that he was required to

Penal Code section 1054.7, states, in relevant part, “The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. *If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately*, unless good cause is shown why a disclosure should be denied, restricted, or deferred. ‘Good cause’ is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.” (Italics added.)

provide late discovery as soon as possible. Appellant counsel's did not deny that he knew that. The court expressed doubt concerning appellant's claim that he had been trying to subpoena the documents for six weeks. The court stated it was at a loss to understand why appellant's counsel continually presented documents without showing them to the prosecutor. The court stated this had been happening "time after time after time[.]" The court characterized appellant's explanations as "very weak."

Moreover, there is no dispute appellant committed a discovery violation with regard to Hearn's testimony and the defense exhibits. That violation did not occur in a vacuum, but in the context of appellant's history of repeated discovery violations which we have detailed in this opinion. We conclude there was substantial evidence that the discovery violation pertaining to Hearn's testimony and the defense exhibits was "willful" (*People v. Edwards, supra*, 17 Cal.App.4th at p. 1264), indeed, that appellant's counsel engaged in a "willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial[.]" (*Id.* at p. 1263.)

Moreover, there was substantial evidence of "prosecutorial surprise or prejudice" (*People v. Edwards, supra*, 17 Cal.App.4th at p. 1264) resulting from the late proffer of Hearn's testimony and the related defense exhibits. The issue arose late in the trial, during appellant's attempt to have Hearn testify as the fourth of five defense witnesses, and the prosecutor indicated he had never seen the documents before. The prosecutor also complained, "[t]his doesn't give the People any time at all to respond."

Further, as to "the impact of preclusion on the evidence at trial and the outcome of the case[]" (*People v. Edwards, supra*, 17 Cal.App.4th at p. 1264), we note the following. Appellant asserts "the trial court's sanction of exclusion of Faye Hearn's testimony and the DMV documents did not involve merely the preclusion of one witness, but the preclusion of an entire defense -- namely the defense that the tax and license for the 1999 BMW had been paid for by someone other than appellant *and that appellant had no knowledge that the vehicle he had purchased was in fact a salvage vehicle.*" (Italics added.) However, appellant's defense did not posit "that the vehicle he had purchased

was in fact a salvage vehicle.” Appellant’s defense posited that the vehicle he had purchased was *not* a salvage vehicle, but a vehicle in perfect condition with clean title.⁶

Our detailed presentation in our “Factual Summary” demonstrates there was overwhelming, albeit circumstantial, evidence of appellant’s guilt, and the jury

⁶ During opening statement to the jury, appellant’s counsel stated, “We will show that the pink slip in this case comes in as a non-salvaged vehicle. Having nothing to do with [appellant] because [appellant] will tell you he was purchasing a regular automobile. (*Sic.*) He didn’t get a salvage title. He got a non-salvaged title for the 1999 BMW convertible that he purchased. The DMV issued them that title.” Appellant’s counsel later stated, “We will show through the Department of Motor Vehicles that basically the only way you can register a car and get clean title is because it is a non-salvaged car . . . if it’s a salvaged vehicle, says salvage on it. We will show you [appellant’s] title does not say salvage. [¶] Now, he didn’t make up the pink slip. That comes from DMV. And it came as a non-salvaged automobile.” Appellant’s counsel also stated, “We have a picture of . . . a witness with that car . . . and other people, . . . who have been in that car. So, the car existed and it was a beautiful vehicle so it could not have been the salvaged vehicle with that VIN number. [¶] So, it’s our belief that the evidence will show that someone stole a 1999 BMW, bought a salvage from someone, took the VIN number and switched it and then someone sold the vehicle to [appellant], and [appellant] registered it as a used car in perfect condition and was given a clean title by the Department of Motor Vehicles.”

During jury argument, appellant’s counsel urged, “I heard the prosecutor say that’s one of our theories that this was a salvage car purchased by [appellant] then registered as a clean car so he can do an insurance fraud. That was never our theory. . . . We have said all along that this is a VIN switched vehicle. All along that this vehicle existed. All along that this was a clean automobile. . . .” Appellant’s counsel later urged, “You have to look at all the evidence and you have to determine which theory is correct. Is it the People’s theory that’s correct that my client is a masterminding criminal who purchases for 64 hundred dollars from Lynwood Auto A Salvage Wreck or did he buy an automobile that was in perfect condition and obtain clean title to it for 36,500 some odd dollars[?]” Finally, appellant’s counsel urged, “. . . if you believe that he purchased the vehicle that was a clean vehicle with clean title which the evidence seems to point to and he went to a movie and lost his car it would be the same thing that happened to any one of us and then we make a claim. If suddenly the insurance company . . . , determines that they want to check out the V.I.N. and say that this is a salvage car and deny the claim, then you don’t get paid. That doesn’t mean that you knew that the vehicle was in fact a switched V.I.N.” We note that, in appellant’s opening brief, appellant urges, as part of his argument that the court prejudicially erred by excluding the evidence, “Furthermore, DMV records showed this was *not* a salvage vehicle, but had clean title.” (*Italics added.*)

reasonably could have concluded that appellant presented a factually conflicting, madeo, and fabricated defense. We conclude there was substantial evidence that exclusion of Hearn’s testimony and the defense exhibits was proper in light of the “the impact of preclusion on the evidence at trial and the outcome of the case[.]” (*People v. Edwards*, *supra*, 17 Cal.App.4th at p. 1264.)

Further still, the trial court, earlier in the proceedings, had deemed a jury instruction on untimely discovery as a sufficient sanction. (See fn. 2, *ante*.) The issue of discovery sanctions with respect to Hearn’s testimony and the defense exhibits arose at a later stage of the proceedings, and by that time appellant had demonstrated a repeated willingness to violate discovery requirements. Accordingly, we believe the trial court reasonably could have considered that, as to Hearn’s testimony and the defense exhibits, less severe sanctions would have been ineffective.

In sum, the trial court did not commit constitutional error by excluding Hearn’s testimony or the defense exhibits. We also conclude a similar analysis supports the trial court’s exclusion of the document appellant proffered merely to corroborate Anita’s testimony that she previously had paid cash for a car.

Finally, even if the trial court erred by excluding Hearn’s testimony, the defense exhibits, or the document proffered merely to corroborate Anita’s testimony, there was, as mentioned, overwhelming evidence of appellant’s guilt, the jury reasonably could have concluded that appellant’s defense was fabricated, and any error was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) None of appellant’s arguments compel a contrary conclusion.

In his reply brief, appellant specifically refers, for the first time, to additional items of evidence and urges that their exclusion as a discovery sanction was error. In particular, appellant refers to the alleged exclusion of “[t]he [p]hotograph of the 1999 BMW[,]” the “DMV [d]emand for [p]ayment,” and the “[e]vidence of the [b]ounced [c]heck to DMV.”

However, appellant waived any issue concerning the exclusion of these items because he argues the issue as to these specific items for the first time in his reply brief. (Cf. *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.) Moreover, as to the merits, the discovery sanction which the court imposed with respect to the photograph was not exclusion but the giving of a jury instruction regarding untimely discovery.

As to the DMV demand for payment document shown to Rogers, the court did not initially exclude it, but merely indicated the document would not be shown to Rogers “at this time.” And the court later ruled that that document, which appellant also refers to as the “[e]vidence of the [b]ounced [c]heck to DMV,” would be excluded, not as a discovery sanction, but as hearsay. Appellant does not expressly claim that exclusion of the document as hearsay was erroneous. Further, there was overwhelming evidence of appellant’s guilt, and the jury reasonably could have concluded that appellant’s defense was fabricated, therefore, any error in the exclusion of these items of evidence was harmless. (Cf. *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Finally, appellant argues (without citation to the record in that argument) that “Defense counsel provided constitutionally deficient representation. He repeatedly argued to the court either that he did not disclose documents because he had just received them, and/or he did not spell the names of witnesses correctly because he did not know the correct spelling, and/or he did not understand the requirements under [Penal Code] section 1054 to disclose the documents in advance of using them at trial.” We will not canvass the record for appellant to determine the specific alleged errors of which he perfunctorily complains. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Callegri* (1984) 154 Cal.App.3d 856, 865.) Moreover, to the extent the alleged failings of appellant’s trial counsel are referred to in our discussion of the “Pertinent Facts,” we conclude that any such failings did not constitute ineffective assistance of counsel, if for no other reason than the facts that there was overwhelming evidence of

appellant's guilt and the jury reasonably could have concluded that appellant's defense was fabricated. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P. J.

We concur:

KITCHING, J.

ALDRICH, J.